KHAW KIM CHUA & ANOR

v.

DAYANI SDN BHD

HIGH COURT MALAYA, ALOR STAR
ZAINAL ADZAM GHANI J
[CIVIL SUIT NO: 22-10-1999]
8 MAY 2005

CONTRACT: *Building contract - Breach - Defendant agreed to sell completed shop-houses to plaintiffs if they vacated land without compensation - Whether there was consideration - Whether a legally binding contract in existence - Whether sale did not materialise as plaintiffs failed to make a booking - Remedies available*

LAND LAW: *Housing developers - Building contract - Breach - Defendant agreed to sell completed shop-houses to plaintiffs if they vacated land without compensation - Whether there was consideration - Whether a legally binding contract in existence - Whether sale did not materialise as plaintiffs failed to make a booking - Remedies available*

The plaintiffs owned a shop-house and carried on a business on land belonging to one Yayasan Islam Kedah ('the said land') while the defendant was the company responsible, under a joint venture agreement with Yayasan Islam Kedah, to develop the said land for apartments and shop-houses. After negotiations with the committee representing the shopkeepers, who were all squatters on the said land, the plaintiffs were among those with whom the defendant entered into a memorandum of understanding ('the MOU'). Pursuant to cl. 1 of the MOU, they executed a tenancy agreement for a long shop-house that the defendant would build and rent to the shopkeepers for temporary occupation until the completion of the shop-houses to be built by the defendant on the said land. The duration of the tenancy was two years and the monthly rental was a nominal sum of RM1. It was also agreed that the completed shop-houses would be offered for sale to the shopkeepers, including the plaintiffs, and on that basis, the plaintiffs agreed to vacate the said land without any compensation.

Later, the plaintiffs became aware that the defendant was offering shop-houses for sale to the other shopkeepers, and upon discussion with the defendant, was offered a two-storey shop-house for RM178,000. However, although the plaintiffs accepted the offer, nothing came of it as there was no notice from the defendant to execute the sale and purchase agreement for the shop-house as required by the MOU. In 1997, the plaintiffs were forced to leave the long shop-house when it was demolished and were forced to carry on their business at a rented shop-house. The plaintiffs, by this civil suit, were seeking an order against the defendant for the specific performance of the MOU and, in the alternative, damages as compensation. The defendant contended that the MOU was not a legally binding document due to lack of consideration and uncertainty. It also submitted that the plaintiffs could not demand specific performance of the MOU by the defendant to sell the shop-house to the plaintiffs since the sale did not materialise on account of the plaintiffs' failure to make a booking or pay a booking fee, as required by the MOU.

Held (judgment for the plaintiffs):

[1] The defendant had benefited from the MOU by having its squatter problem solved and had thereafter successfully developed the land by building the necessary shop-houses. The consideration by the plaintiffs was their act of vacating the land without compensation that enabled the defendant to proceed with the development of the land. It was, therefore, not true that the agreement as in the MOU was without consideration from the plaintiffs. It was clear that the sale and purchase agreement contemplated by the parties in cl. 4 of the MOU was a mere expression of the desire of the plaintiffs and the defendant as to the manner in which the sale and purchase of the shop-house, which they had already agreed to, be effected. Furthermore, the defendant itself carried out its responsibilities as provided in the MOU by building the temporary shop-house and renting it at a nominal sum of RM1 per month to the plaintiffs. The defendant's objections relating to the MOU were, thus, without merit and this court found that, from the provisions of the MOU and the conduct of the parties, the MOU was a binding contract. (pp 266 c & 267 a-b, f)

[2] By using the Housing Developers (Control and Licensing) Regulations 1989 as a guide, it could safely be said that a booking fee for the sale and purchase of a premises does not exist on its own. It can only be paid by the purchaser and accepted by the vendor contemporaneously upon the execution of a sale and purchase agreement. As the defendant had admitted making the offer for a shop-house to the plaintiffs, it was duty-bound

under cl. 4 of the MOU to extend to the plaintiffs a written notice to execute the sale and purchase agreement to be prepared by the defendant before accepting any booking fee from the plaintiffs. The acceptance of any booking or booking fee under cl. 2 of the MOU must happen simultaneously with the execution of the sale and purchase agreement under cl. 4 of the MOU. Hence, in the circumstances of this case, it was the defendant that had failed to comply with the terms of the MOU by not serving on the plaintiffs a written notice under cl. 4 of the MOU to execute a sale and purchase agreement to be prepared by it within 14 days. (pp 268 g-h & 269 c-e)

[3] Since all the shop-houses had been sold, the plaintiffs were entitled to the alternative prayer for damages under s. 18 of the Specific Relief Act 1950, which were to be assessed by the deputy registrar at a date to be fixed. (p 271 b)

[Order accordingly.]

Case(s) referred to:

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(foll)***

Lee Hoy & Anor v. Chen Chi [1971] MLJ 77 ***(refd)***

Lim Hong Liang v. Tan Kim Lan [1997] 4 CLJ 175 HC ***(foll)***

Tan Sri Khoo Teck Puat & Anor v. Planitude Holdings Sdn Bhd [1994] 3 MLJ 777 ***(refd)***

Von Hatzfeldt-Wildenburg v. Alexander [1912] 1 Ch 284 ***(foll)***

Legislation referred to:

Contracts Act 1950, ss. 2(d), 26

Housing Developers (Control and Licensing) Regulations 1989, reg. 11(2)

Housing Development (Control and Licensing) Act 1966, s. 3

Specific Relief Act 1950, s. 18

For the plaintiff - Nawal Harun; M/s Omayah, Nawal & Partners

For the defendant - Tay Chai Huat; M/s Tay Chai Huat & Co

Reported by Suresh Nathan

JUDGMENT

Zainal Adzam Ghani J:

The plaintiffs owned a shophouse and carried on a hair-dressing business on land at Mukim Pengkalan Kundor, Kedah which belonged to Yayasan Islam Kedah. The defendant is the company responsible under a joint-venture agreement with Yayasan Islam Kedah to develop the said land for apartments and shophouses. Although the joint-venture agreement was before 1985 the defendant could not proceed with the project as they encountered problems

with squatters on the land. The two plaintiffs were among the squatters. After negotiations with the committee representing the squatters, the plaintiffs were among those with whom the defendant entered into a memorandum of understanding P2 (hereinafter referred to as "m.o.u."). The m.o.u. was by executed the defendant and the plaintiffs on 18 January 1993.

The relevant provisions of the m.o.u. reads as follows:

> ... (b) The LICENSEE has been shop owner on part of the said lands and has carried on an existing business thereon.
>
> (c) As part of the urban renewal privatisation scheme abovesaid DAYANI has agreed to relocate and the LICENSEE has agreed to be relocated to other premises.
>
> NOW IT IS HEREBY AGREED as follows:
>
> 1. DAYANI will erect a temporary single storey long shop house measuring 16 feet by 40 feet on the said lands for rental to the LICENSEE for a period of two (2) years subject however to the terms and conditions to be incorporated in a Tenancy Agreement drawn up by DAYANI to be executed by the LICENSEE within seven (7) days of written notice of offer of tenancy.
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> 2. Upon execution of the said tenancy agreement the LICENSEE will have priority to make a booking for any shophouse within the First Phase to be erected on the said lands.
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> 3. The price of each unit of shophouse shall be:
>
> (a) RINGGIT ONE HUNDRED AND SIXTY FIVE THOUSAND ($165,000.00) ONLY for one unit two (2) storey intermediate shophouse.
>
> (b) RINGGIT TWO HUNDRED AND SIXTY FIVE THOUSAND ($265,000.00) ONLY for one unit three (3) storey intermediate shophouse.
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> 4. The sale and purchase agreement of such shophouse to be prepared by DAYANI shall be executed by the LICENSEE within fourteen (14) days of the receipt of written notice from DAYANI or its agent, failing which the offer herein shall automatically be withdrawn and the LICENSEE shall vacate the temporary single storey long shophouse within three (3) months thereafter. ...

Pursuant to clause 1 of the m.o.u. the two parties executed a tenancy agreement (P3) also on 18 January 1993. According to section 3.01 of the tenancy agreement the duration of the tenancy was for two years and according to section 5.01 of the tenancy agreement the rental was a nominal sum of RM1 per month.

The plaintiffs' case was that the long shophouses built by the defendant and rented to the shopkeepers were for temporary occupation until the completion of the shophouses to be built by the defendant on the said land. It was also then agreed that the completed shophouses will be offered for sale to the shopkeepers including the plaintiffs. On that basis the plaintiffs agreed to vacate the said land without any compensation. Sometime in 1994 the plaintiffs became aware that the defendant was offering for sale shophouses to the other shopkeepers. The plaintiffs instructed their lawyer to discuss with the defendant's lawyer. Their lawyer subsequently informed them that the defendant had offered for sale to them a two storey shophouse on lot 164 at RM178,000. The plaintiffs through their lawyer informed the defendant's lawyer that they accepted the offer by a letter dated 24 October 1994 (P4). However, according to the plaintiffs nothing materialized as there was no notice from the defendant to execute the sale and purchase agreement for the shophouse as required by the m.o.u. In 1997 the plaintiffs were forced to leave the long shophouse when it was demolished. Since then the plaintiffs claimed that they were forced to carry on their business at a rented shophouse. By this civil suit the plaintiffs are seeking an order against the defendant for the specific performance of the m.o.u. and as an alternative damages as compensation.

The defendant's manager (SD1) who gave evidence on behalf of the defendant essentially agreed as to the circumstances leading to the execution of the m.o.u. and the tenancy agreement. He also agreed that the defendant did offer a two storey shophouse on lot 164 to the plaintiffs as in P4. However the SD1 stressed that the plaintiffs failed to make any booking or pay any booking fee as required by the m.o.u. to show that they were really keen to purchase the shophouse. As a result there was no sale and purchase agreement signed for the shophouse. Also the tenancy agreement was not renewed on its expiry after two years. The defendant therefore averred that the plaintiffs cannot demand specific performance of the m.o.u. by the defendant to sell the shophouse to the plaintiffs as the sale did not materialize on the account of the plaintiffs' failure to make a booking or pay any booking fee as required by the m.o.u. Apart from that the defendant contended that the m.o.u. was not a legally binding document for lack of consideration and uncertainty. The requirement that a contract or an agreement must be with consideration is stipulated in s. 26 of the Contracts Act 1950; and s. 2(d) of the Act defines "consideration".

The defendant's argument is based on the Supreme Court case of *Ayer Hitam Tin Dredging Malaysia Bhd. v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133. The facts of that case briefly was that the respondent through its parent company had entered into negotiations with the appellant to develop and construct low-cost houses and shophouses for the workers of the appellant.

By a letter dated 19 September 1984 the appellant accepted the respondent's proposals in respect of the project subject to certain terms and conditions, one of which was that the terms and conditions in the letter were to be constituted in an agreement between them and the appropriate indemnity clauses in favour of the appellant be incorporated in the agreement. In reliance of that letter the respondent proceeded to perform some of the obligations stated therein, although no formal agreement was executed. Subsequently the appellant instructed the respondent to cease work. The primary issue was whether there was a concluded contract between the two parties. On the facts of the case the Supreme Court found that there was no contract binding in law but only a record of the terms which were agreed as a basis for the negotiation of a contract. At the most, it was only a letter of intent to enter a contract at a future date. The letter in dispute clearly contained, among other terms and condition, "... The above terms and conditions be constituted in the form of an agreement ... with appropriate indemnity clauses ...". After that letter there were a series of letters between the respondent's parent company and the appellant which clearly showed that the terms of the contract to be finalized were far from concluded.

On the principles to determine whether there was a binding contract between the two parties, the Supreme Court had this to say:

> Broadly stated, the result of this appeal depends upon the answer to the question whether, having regard to the circumstances outlined above, the letter of 19 September 1984 embodies any contractual obligations between the parties.
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> In *Smith v. Hughes* it was said that the existence of an agreement depends upon the intention of the parties, and that for there to be an agreement the parties must be ad idem, ie there must be a consensus between them.
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> But, bearing in mind the familiar saying that a person's beliefs or his state of mind are just as much facts as the state of his digestion or the existence of a tangible object, from what factors may the existence of an agreement be inferred? The authorities show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract.
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> In other words, in its task of ascertaining the intention of the parties, the court will, generally speaking, apply an objective test; more particularly, it will ask itself, what would the intention of reasonable men be if they were in the shoes of the parties to the alleged contract.

In the present case however the situation is different. The m.o.u. was the result of the negotiations between the defendant and the plaintiffs through the committee representing the squatters. There was subsequently no negotiation or mention of any negotiation anywhere to finalize any other term or condition not finalized upon. By virtue of the m.o.u. both the plaintiffs and the defendant effectively carried out their respective responsibilities as agreed. The plaintiffs vacated the land and the two parties executed the tenancy agreement whereby the defendant rented a long shophouse to the plaintiffs for RM1 per month for two years. The defendant had benefited from the m.o.u. by having the squatter problem solved and thereafter successfully developed the land by building the necessary shophouses. The consideration by the plaintiffs was their act of vacating the land without compensation which enabled the defendant to proceed with the development of the land. It is therefore not true that the agreement as in the m.o.u. was without consideration from the plaintiffs.

Applying the principles as stated by the Supreme Court in *Ayer Hitam*'s case I find that a plain reading of the m.o.u. clearly showed that the rental of the long shophouse is a temporary accommodation to relief the plaintiffs pending the completion of the shophouse to be erected by the defendant on the land and to be sold to the plaintiffs on a priority basis. The offer of a shophouse by the defendant to the plaintiffs upon its completion is the principal term of the m.o.u. The sale and purchase agreement for the shophouse to be executed by the two parties is purely the procedure or manner to formalize that term of agreement already concluded and agreed upon between them in the m.o.u. Unlike the facts in *Ayer Hitam*'s case the offer to sell the shophouse by the defendant to the plaintiffs was no longer subject to negotiations but an agreed solution to the squatter problem as a result of negotiations between the defendant and the committee representing among others the plaintiffs.

On the same issue the principles in the case of *Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch. 284 (referred to by the Supreme Court in *Ayer Hitam*'s case) is also on point. There the court said:

> ... It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and reference to the more formal document may be ignored ... .

Applying that principle to the present case, in my opinion it is clear that the sale and purchase agreement contemplated by the parties in cl. 4 of the m.o.u. is a mere expression of the desire of the plaintiffs and the defendant as to the manner in which the sale and purchase of the shop house, already agreed to between, be effected. The objections by the defendant relating to the m.o.u. is therefore without merit and I find that, from the provisions of the m.o.u. and the conduct of the parties, the m.o.u. was a binding contract.

The law on this issue was also considered in the case of *Lim Hong Liang v. Tan Kim Lan @ Tan Kim Leng* [1997] 4 CLJ 175, where Haidar J (as His Lordship was then) in his judgment said:

> ... I agree that in construing whether a document has legal effect or not, the label attached to the document say, 'memorandum of understanding', is not the criteria for construing such a document. In this regard, the Court of Appeal in *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26 in quoting with approval the case of *Addiscombe Garden Estates Ltd v. Crabbe* [1958] 1 QB 513 at p 528; WLR 980 at p 981) said at p 147:
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> > No doubt it is described as a guarantee. But in the construction of contracts, the court is not bound by the labels that parties choose to affix onto the particular document. In all such cases, the duty of the court is clear. And that duty is to construe the document as a whole and to determine from its language and any other admissible evidence its true nature and purport.
>
> ... In other words, the court will have to determine from its language and any other admissible evidence its true nature and purport.

Again, not only were the intentions of the defendant and the plaintiffs clearly stated out in the m.o.u. but the defendant themselves carried out their responsibilities as provided in the m.o.u. by building the temporary long shophouse and renting it at a nominal sum of RM1 per month to the plaintiffs. The defendant even went to the extent of offering a completed shophouse to the plaintiffs. That effectively showed that the defendant themself acknowledged that the m.o.u. was binding on them. The defendant therefore cannot now be heard to say that the m.o.u. did not have any binding effect on them.

The next issue therefore is whether the plaintiffs were in breach of the m.o.u. as claimed by the defendant or whether it was the defendant who was in breach of the m.o.u. as claimed by the plaintiffs. On this matter as stated earlier the defendant stressed that the plaintiffs failed to make any booking or pay any booking fee as required by cl. 2 of the m.o.u. As a result there

was no sale and purchase agreement executed between them as provided in cl. 4 of the m.o.u. The defendant however admitted that they did offer to the plaintiffs a shophouse, to wit lot 164, as evidenced by P4. With that being so, booking and booking fee required of the plaintiffs is a non-issue. The defendant has clearly waived the requirement of booking under cl. 2 of the m.o.u. themself. That is because without any booking or booking fee by the plaintiffs the defendant has offered a shophouse to them. According to the defendant's argument, as submitted by his counsel, the booking fees after all was to "... memastikan mereka benar-benar berminat untuk membeli lot-lot yang ditawarkan ...". Paragraph 2 of the plaintiffs' lawyer's letter (P4), produced as follows, cannot be any clearer as to the plaintiffs' interest to purchase the shophouse:

> ... Kami telah diarahkan, bahawa anak guaman kami menerima tawaran membeli lot yang ditawarkan yang bernombor lot 164, 2 tingkat rumah kedai yang akan didirikan oleh anak guaman tuan ... .

After all according to cl. 2 of the m.o.u. the defendant was under an obligation to give priority to the plaintiffs when the shophouse to be build on the said land is completed.

However, the defendant further argued that to constitute "booking" as provided in cl. 2 of the m.o.u., the plaintiffs must pay a booking fee before hand and that is consistent with the "usual procedure". Unfortunately this bare submission on "usual procedure" is however not substantiated by the defendant through any evidence or authority. I note also that the manner for the plaintiffs to make the booking as stated in cl. 2 of the m.o.u. is not provided. Furthermore, Article IX section 9.01 at the tenancy agreement, which provide that the plaintiffs shall have an option to purchase the shophouse to be erected on the said land 14 days from the service of a written notice by the defendant, makes no mention of any booking or booking fees. What therefore is the "usual procedure" on booking or booking fees for the sale and purchase of a shophouse? As a guide and in the absence of any evidence or authority on the "usual procedure" I can only rely on what is provided by law for booking and booking fees in the Housing Developers (Control and Licensing) Regulations 1989.

I say as a guide because that Regulations regulate the sale and purchase of "housing accommodations" which by definition in s. 3 of the parent Act exclude shophouse constructed solely as a business premise. It is not clear in this case whether the "shophouse" is solely for business or partly for human habitation and partly for business. However, according to reg. 11(2) of the Regulations a housing developer can only collect payment in any form (ie,

including booking fees) by signing a contract of sale and purchase. According to the sale and purchase agreement in schedule G of the Regulations the 10% booking fee can only be collected upon the signing of the sale and purchase agreement. It is an offence for the developer to do otherwise. This is obviously for the protection of the purchaser and to bind the developer after accepting the booking fee to his promise to build the premise. I can see no reason why this statutory procedure should not be accepted as the "normal procedure" for the sale and purchase of a business premises as in this case.

With that as a guide, it can safely be said that booking fees for the sale and purchase of a premises do not exist on its own. It can only be paid by the purchaser and accepted by the vendor contemporaneously upon the execution of a sale and purchase agreement. As the defendant has admitted making the offer for a shophouse to the plaintiffs the defendant is therefore duty bound under cl. 4 of the m.o.u., before accepting any booking fee from the plaintiffs, to extend to the plaintiffs a written notice to execute the sale and purchase agreement to be prepared by the defendant. The acceptance of any booking or any booking fee under cl. 2 of the m.o.u. must happen simultaneously with the execution of the sale and purchase agreement under cl. 4 of the m.o.u. On this issue I am therefore of the considered opinion that, in the circumstances of this case, it was the defendant who has failed to comply with the terms of the m.o.u. by not serving on the plaintiffs a written notice under cl. 4 to execute a sale and purchase agreement to be prepared by them within 14 days.

The other issue raised by the defendant is that the m.o.u. and the tenancy agreement are inter-connected and as such the legal effect of the two documents was that the provisions of the two are also inter-connected. According to the defendant cl. 2 of the m.o.u. refers to the tenancy agreement and both were executed on the same day. As a result, Article III section 3.01 of the tenancy agreement which provides the rental period for two years also applies to the m.o.u. When the tenancy which expired on 18 January 1995 and was not renewed or extended the plaintiffs were no longer legally a tenant and as such the plaintiffs have no basis in law to seek an order for specific performance of the m.o.u. The defendant also raised the argument that the plaintiffs has no right to seek that order as they failed to pay the monthly rent as required by the tenancy agreement.

On this issue, after a careful reading of the two agreements, I find that although the two are somewhat inter-connected, the termination of the tenancy agreement whether at the end of the two years duration of tenancy or for other reason as provided in the tenancy agreement does not necessarily have the effect of terminating automatically the m.o.u. According to section 3.01 of the tenancy agreement, the tenancy was for two years and if not renewed or extended the tenancy obviously would terminate upon the expiry of two years. Non payment of rental by the plaintiffs or non performance of any covenants by the plaintiffs would give the defendant the right to terminate the tenancy agreement (section 8.04). However, nowhere in the tenancy agreement or the m.o.u. was it provided that the m.o.u. would terminate should the two circumstances as above arise. Only cl. 4 of the m.o.u. provides for the offer of the shophouse by the defendant to the plaintiffs be automatically withdrawn if the plaintiffs fail to execute the sale and purchase agreement to be prepared by the defendant 14 days of the receipt of written notice from the defendant. Based on my findings earlier, this provision is not relevant. In addition, it is noteworthy that although the defendant claimed that the plaintiffs never paid the required rental for the temporary long shophouse, the defendant never disputed the plaintiffs evidence to the effect that the defendant themselves allowed the plaintiffs to stay on the temporary long shophouse not only for the duration of the tenancy but until its demolition in 1997; ie, well after the two years rental period as provided in the tenancy agreement. This is despite the fact that the defendant could have easily terminated the tenancy agreement by serving a one month notice of termination of the tenancy on the plaintiffs at any time without assigning any reason whatsoever under section 9.06 or section 8.07 of the tenancy agreement respectively to the plaintiffs.

There were other minor issues raised by the defendant but suffice for me to say that I need not deal with them as they are inconsequential to the decision in this case. The crux of the matter in this case is that upon the execution of the m.o.u. the plaintiffs willingly vacated the land without compensation. The rental of the long shophouse by the plaintiffs with nominal rental was a temporary measure or arrangement pending the offer on a priority basis of a shophouse to be offered by the defendant. The price range for the shophouse was also settled. After the successful development of the project the defendant cannot without any valid reason repudiate the clear and agreed terms and condition of the m.o.u. which binds the two parties. The offer to the plaintiffs of a shophouse by the defendant, apart from having to give priority to the plaintiffs, should have been a honest and a genuine offer. It is reasonable under the circumstances of this case for the plaintiffs after such an offer to expect the defendant, and it was obligatory under the m.o.u. for the defendant, to issue a written notice to the plaintiffs to execute the sale and purchase

agreement for the shophouse. The test as stated by the Supreme Court in *Ayer Hitam*'s case is after all of the reasonable men in the shoes of the parties of the contract. As it transpired no such written notice was served on the plaintiffs by the defendant.

Based on all the above-said I therefore give judgment to the plaintiffs with costs. Since all the shophouses, especially the lot 164, has been sold the plaintiffs are entitled to the alternative prayer for damages under s. 18 of the Specific Relief Act 1950 (see: the Federal Court cases of *Lee Hoy & Anor v. Chen Chi* [1971] MLJ 77 and *Tan Sri Khoo Teck Puat & Anor v. Planitude Holdings Sdn. Bhd.* [1994] 3 MLJ 777). The damages shall be assessed before the Deputy Registrar at a date to be fixed.